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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1989

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THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.* ,  
Petitioners,  
v.  
CSX TRANSPORTATION, INC., *et al.* ,  
Respondents.

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE RAILWAY LABOR  
EXECUTIVES' ASSOCIATION  
IN SUPPORT OF PETITION FOR CERTIORARI

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August 30, 1990

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**BRIEF AMICUS CURIAE OF THE**  
**RAILWAY LABOR EXECUTIVES' ASSOCIATION**  
**IN SUPPORT OF PETITION FOR CERTIORARI**

This *amicus* brief is being filed with the written  
consent of the parties pursuant to Supreme Court Rule 37.2.<sup>1/</sup>

**INTEREST OF THE AMICUS CURIAE**

The Railway Labor Executives' Association ("RLEA") is an unincorporated association whose membership is comprised of almost all of the nation's rail unions, representing over 300,000 railroad employees. The health and safety of a large percentage of these would be aided by the State of Ohio's rules. RLEA represents its membership in numerous forums including collective bargaining and Federal and state legislation and regulations. As it relates to the pending litigation, RLEA participated in all the Federal legislative efforts including the relevant Federal Railroad Safety Act, 45 U.S.C. §§ 421 *et seq.*, ("FRSA"), the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801 *et seq.*, ("HMTA") the Federal regulations adopted thereunder and the proceedings in the State of Ohio.

The Federal railroad enforcement program is seriously lacking due to mismanagement, philosophical ideals and budget constraints. Thus, when Federal inspections fail, rail labor is the last and only check on the system. As such rail labor is in a unique position to witness and report the impact of

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<sup>1/</sup> Counsel have obtained the consent of petitioners and respondents to filing of this brief. Their letters to that effect have been lodged with the Clerk.

the regulatory effort in the transportation of hazardous materials by rail. Rail labor is threatened each and every day with serious injury or death when working in and around hazardous materials.

In terms of legal argument, *amicus* does not seek here to embellish the petition filed on behalf of the State of Ohio. Instead, this brief outlines the parody of a regulatory system that fails its essential purpose.

### SUMMARY OF ARGUMENT

The decision by the Sixth Circuit in *CSX Transportation, Inc. v. Public Utilities Commission of Ohio*, 901 F.2d 497 (6th Cir. 1990), creates a vacuum wherein all railroads that transport hazardous materials and toxic substances can effectively avoid compliance with any and all regulation.<sup>2/</sup> Under the Sixth Circuit's ruling, the State of Ohio must suffer the hazard of being victim to unsafe hazardous materials transportation within its state, and the indignation of not being able to address the problem.

The history of the incestuous alliance with the Federal Railroad Administration ("FRA") and the railroads it is charged with regulating is revealing.<sup>3/</sup> Rail labor, the National

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<sup>2/</sup> The nation's railroads transport approximately 3,000 car loads of hazardous materials daily totalling about 4 billion tons annually.

<sup>3/</sup> The Secretary of Transportation ("Secretary") delegated his responsibilities under the FRSA to the FRA. See 49 C.F.R. 1.49(m) where the FRA is delegated authority to "carry out the functions vested in the Secretary by the Federal Railroad Safety Act of 1970." The FRA's

Transportation Safety Board ("NTSB"), the General Accounting Office ("GAO"), the Office of Technology Assessment ("OTA"), and Congress have long questioned FRA's devotion to safety and its meek enforcement tactics. Nevertheless, if the decision of the Sixth Circuit is not reviewed, the railroads will be given *carte blanche* to dictate safety by their balance sheets.

The *amici* will now bring to the Court's attention a theme of misplaced Federal enforcement that delegates public safety to entrepreneurial discretion. Railroad safety in general, and particularly the transportation of hazardous materials, has been neglected by a remiss Federal agency that disregards the appeal for oversight that would greatly enhance rail safety.

*Amicus* recognizes the concern to keep interstate commerce moving without undue state intervention. Yet, Federal preemption of state health and safety laws must not be lightly viewed.<sup>4/</sup> A state must not be foreclosed from practicing that which protects its own citizens from unsafe railroad operations. The states have a vested and substantial goal in establishing an effective program designed to ease the burden on the Federal system, while simultaneously creating safe hazardous materials transportation.

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affair with the railroads has continually been criticized. Recently that program has been reproached. See *infra* at 5-14.

<sup>4/</sup> The regulation of health and safety has long been considered as "primarily, and historically" a matter of local concern. See *Hillborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719, 105 S.Ct. 2371, 2376 (1985).

## ARGUMENT

### I THE MIAMISBURG ACCIDENT

On July 8, 1986, fifteen rail cars on a Baltimore and Ohio Railroad Company derailed in Miamisburg, Ohio. Three of the cars were tank cars which contained yellow phosphorus, molten sulfur, and tallow. The tank car containing molten sulfur ruptured, and during the following 48 hours, a 3-square mile area was evacuated. Initially, 7,000 residents were evacuated; however, eventually an estimated 30,000 people were forced to leave their homes and businesses. A total of 569 persons were treated for various complaints during the incident. Property damage totalled \$3.5 million.

On September 29, 1987, the NTSB issued its report on the B&O accident at Miamisburg, Ohio. *See* NTSB/HZM-87/01 (September 29, 1987). In its conclusion, the NTSB stated that the FRA has not established direction nor control over the implementation of the authority it delegated to the Association of American Railroads ("AAR") to assure that public safety concerns are appropriately balanced against industry economic interests for tank car safety. The NTSB said that the absence of effective FRA action has resulted in an industry self-regulated system which does not provide adequate public safety accountability on decisions made affecting tank car designs, construction, and modification. *See Id.* at 45-47.

More specifically, the NTSB was highly critical of FRA's enforcement procedures. The NTSB concluded:

17. The FRA has not established sufficient direction or controls over the AAR's implementation of the authority it delegated for tank car safety to assure that public safety concerns are appropriately balanced against industry economic interests.

18. The absence of effective FRA action for determining the adequacy of the AAR's implementation of the delegated responsibilities has resulted in an industry self-regulated system which does not provide adequate public safety accountability on decisions made affecting tank car designs, construction, and modification.

*Id.* at 46-47.

These findings exasperate those who worked so hard to pass the FRSA and the HMTA. The railroads have turned both laws into irritations, not safety tools.

## II THE FRA IS NOT POLICING THE FRSA AND HMTA AND THE STATE OF OHIO PAYS THE PRICE

### A. The Dilemma With Tank Cars

Tank cars are the primary means by which railroads transport hazardous materials. The FRA has abdicated its responsibility here and entrusted the railroads with that authority. The compendium is telling and several independent Federal agencies have been critical of the policy.

After disasters at Waverly, Tennessee, in 1978 and Paxton, Texas on September 8, 1979 the NTSB held unprecedented *en banc* hearings on the carriage of hazardous materials by rail. Foremost, the NTSB found:

The evidence indicated that tank cars can and should be made safer. The jumbo tank cars were designed and

certified by an interlocking group of business interests who manufacture, buy, sell, and use tank cars. Witnesses from the Federal Railroad Administration (FRA), shippers, and tank car companies testified that the design of the jumbo tank cars did not represent a level of safety commensurate with their 200-percent increase in product capacity.

NTSB-R-78-28-31 (1978).

The facts of the Paxton accident gave rise to the NTSB *SPECIAL INVESTIGATION REPORT, The Accident Performance of Tank Car Safeguards*, NTSB-HZM-80-1 (March 8, 1980) where the NTSB made a number of urgent recommendations. *See Id.* at 20-21. FRA took almost four years to implement some of the recommendations. *See* 49 Fed. Reg. 3468 (January 27, 1984), and took no further action until strong Congressional persuasion forced FRA to recognize its obligation. FRA is only now initiating a rulemaking partially addressing the subject. *See* 55 Fed. Reg. 20242 (May 15, 1990).

Notwithstanding opposition to its lax attitude, FRA still delegates to the railroads unbridled power. One of the most revealing statements then, and applicable now, states, "[p]ast history indicates that the industry determines DOT's action in tank car specifications and modifications." *See* NTSB-SEE-78-2, 5 (June 23, 1978). Today, the AAR still inspects the manufacturers' facilities to determine compliance with its standards. This inspection system receives guidance from the AAR Committee on Tank Cars which is composed of thirteen members, seven from the railroads and six from



various trade organizations.<sup>5/</sup> The AAR has more power in the transportation of hazardous materials than does the State of Ohio, or any other state. This is not the intent of Congress.

The FRA conduct here is merely a glimpse at one of the many underlying problems with hazardous materials transportation by rail. The true dilemma faced by the State of Ohio and all other states is not how to regulate, rather, how to legally enforce Federal regulations. Congress and three independent Federal agencies all desire that end. *Amicus* respectfully suggests that the duty of the State of Ohio to protect its citizens from conduct suggested, outweighs the desertion of Federal duty.

#### B. The FRA Is Not Doing Its Job

FRA has long been the focus of criticism for its poor job of administering railroad safety. Initially, FRA refused to adopt regulations within one year from date of enactment as required by the statute. Not until late 1973 did FRA finally promulgate its first rule. See H.R. Rep. No. 93-1083, 93 Cong. 2d Sess. 9 (1974). Congressional criticism was harsh:

The weight of evidence gathered in testimony before the Subcommittee indicated the Federal Railroad Administration simply was not living up to neither the spirit of the Federal Railroad Safety Act of 1970, nor, in some cases, the letter of the law.

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<sup>5/</sup> These organizations include, The American Petroleum Institute, The Chlorine Institute, The Compressed Gas Association, Chemical Manufacturing Association, National LP-Gas Association, and the Railway Progress Institute.

*Id.* at 6.

In 1975 Congressional dissatisfaction with FRA became further evident. *See* H.R. Rep. No. 94-240, 94th Cong., 1st Sess. 5 (1975). FRA's lack of concern for safety led Congress in 1976 to enact several amendments which were designed to put some teeth into FRA's enforcement activities. Moreover, the Committee found "that FRA should move expeditiously to encourage more States to participate in the enforcement of Federal rail safety regulations." H.R. Rep. No. 94-1166, 94th Cong., 2nd Sess. 8 (1976).

In 1978 the Administrator of the FRA, testifying before both the House and Senate admitted that the railroad safety program had worsened instead of diminished since the passage of the FRSA. *See Hearings Before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 10,556, 95th Cong., 2d. Sess. 87-89 (March 15 and 16, 1978).* The problem with FRA caused nine members of the House Committee on Interstate and Foreign Commerce to file *Separate Views on FRA's Lack of Attention to Railroad Safety*, H.R. Rep. No. 95-1176, 95th Cong., 2d Sess. pp. 16-20 (1978). The members identified what they considered to be the greatest single problem in rail safety today: "[T]he failure and apparent refusal of the Federal Railroad Administration (FRA) to enforce the Federal rail safety statutes in the aggressive manner as intended by Congress." *Id.* at 16. The nine members called for definitive action by Congress in three areas. First, Congress should seek ways to force FRA to initiate an aggressive program of enforcing Federal safety



statutes and regulations. Second, an appropriation should not be limited to sums that the FRA seeks. Third, in view of FRA's failures, the various states should be given greater authority over rail safety.<sup>6/</sup> *Id.* at 20. Congressional intent can not be stronger.

In 1978, the myriad of problems with FRA caused Congress to request that the OTA evaluate the Federal railroad safety program. In general the study concluded that FRA had failed to set safety goals and had been unable to implement its enforcement authority effectively. In particular, data collection was found to be piece-meal and inadequate; inspections did not correlate with demonstrated needs for a decrease in accidents; regulations did not appropriately set forth performance standards; and penalties were not being assessed in a rational manner. Finally, the state participation program was not being administered effectively. *See* Sen. Rep. No. 96-785, 96th Cong. 2d Sess. 3 (1980).

In 1986, OTA again revisited the FRA and remarkably concluded that the identical problems still existed.

Rulemakings are initiated either by petition from industry of an interested party, or are forced on DOT by widespread public concern, often focused through NTSB or Congress. This kind of reactive rulemaking does not measure up to today's needs.

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<sup>6/</sup> Today, there are 31 states employing 109 inspectors participating in safety inspections. The FRA currently employs 361 inspectors, of which only approximately 10% are hazardous materials inspectors.

*See Transportation of Hazardous Materials*, Office of Technology Assessment, 8 (July 1986). *See also Hazardous Materials Transportation: Hearings Before The Subcommittee On Commerce, Science, and Transportation*, 100th Cong., 1st Sess. 22 (1987).

In 1988, the GAO conducted a study that showed in Pennsylvania alone, the FRA levied only one fine, \$2,500.00, in twenty one accidents despite glaring violations of federal regulations by the railroad industry. *See Railroad Safety: Accidents in Pennsylvania and Related Federal Enforcement Action*, GAO/RCED-89-52 (November 1988). The *amicus* notes here that this steady practice by the FRA has placed the public in the precarious position of waiting for a Pandoras tank car to open, spill or explode and devastate any community because of the inadequate rail safety standards and poor Federal enforcement.

The GAO issued another report on its investigation of railroads underreporting injuries and accidents, which merits attention here. The Report, entitled *Railroad Safety - FRA Needs To Correct Deficiencies In Reporting Injuries And Accidents*, GAO/RCED-89-109 (April 1989), reviewed data for calendar year 1987 on five railroads and determined that the injury and accident data base is unreliable because of serious underreporting. The GAO selected the CSX, Union Pacific, Amtrak, Chicago & North Western and the Chicago Central & Pacific railroads.<sup>2/</sup> The GAO uncovered

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<sup>2/</sup> In summary the GAO found:

substantial underreporting and inaccurate reporting of injury and accident data by the railroads it visited, which raises questions about the overall effectiveness of FRA's safety program and the extent to which railroads have become safer.

*Id.* at 3.

This year, the GAO again found fault with FRA's inspection program. In its Report, *Railroad Safety More-FRA Oversight Needed to Ensure Rail Safety in Region 2*,

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--Lost work days associated with employee injuries, which is an FRA measure of injury severity, were underestimated by about 269 percent at the four railroads whose records were audited. CSX underestimated lost work days by over 270 percent.

*See Id.* at 16.

--FRA data reflected only 57 percent of the actual number of severe injuries, defined by FRA as 10 or more lost work days, at three of the railroads surveyed.

*See Id.* at 17.

--Amtrak, CSX and UP did not report 61 of 521 or 12% of the injuries that met FRA's reporting criteria.

*See Id.* at 17.

--The CSX, UP & Amtrak collectively underreported railroad accidents by 10%. CSX underreported accidents by almost 43%.

*See Id.* at 19.

--The railroads underreported by 52% the amount of property damage sustained in 171 accidents. CSX understated damages by 69%.

*See Id.* at 21.

GAO/RCED-90-140 (April 1990).<sup>8/</sup> The GAO determined that "Region 2 has no written goals regarding how often hazardous materials shipper and railroad facilities should be inspected." *Id.* at 5. The GAO concluded that

[t]he lack of written inspection goals and complete and up-to-date inspection point lists, and possibly inadequate inspector resources hamper the effectiveness of the FRA Region 2 hazardous materials inspection program.

*Id.* at 13. GAO also found

FRA Region 2 has not established inspection frequency goals and does not maintain complete, up-to-date lists of the inspection points (hazardous materials shippers and railroads) that it should be inspecting. Also, because hazardous materials shippers are not required to register, FRA may never identify and inspect some of these shippers. Seventy percent of the region's inspection points were not inspected in 1987 and 1988. (Footnote omitted) In our view, Region 2 may not have enough inspectors to effectively carry out its inspection program.

*Id.* at 3.

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<sup>8/</sup> As of March 1990, Region 2 had six hazardous materials inspector positions to cover six states--Delaware, Maryland, Ohio, Pennsylvania, Virginia, and West Virginia--and the District of Columbia. The hazardous materials inspectors identify and inspect shippers, railroads, and rail cars involved in transporting hazardous materials that travel over about 22,000 railroad route miles in the region.

*Id.* at 3.

Finally, FRA statistics, substantiate the position of the State of Ohio.

**FRA ENFORCEMENT OF HAZARDOUS MATERIALS<sup>2/</sup>**

|                      | 1987      | 1988      | 1989      |
|----------------------|-----------|-----------|-----------|
| Inspections          | 8,335     | 7,880     | 8,069     |
| Tank Cars Inspected  | 73,283    | 65,513    | 77,765    |
| Defects Recorded     | 17,050    | 17,948    | 16,904    |
| Violation Reports    | 399       | 622       | 815       |
| Claims Settled       | 262       | 187       | 474       |
| Settlement Amount    | \$565,800 | \$393,455 | \$789,960 |
| Cost/defect recorded | \$33.18   | \$21.92   | \$46.73   |

With absolutely no deterrent effect from FRA enforcement, it is not surprising to find that hazardous materials accidents are on the rise.<sup>10/</sup>

<sup>2/</sup> Source: Office of Chief Counsel, Federal Railroad Administration.

<sup>10/</sup> In the AAR's, *Annual Report On Hazardous Materials Transported By Rail, Year 1989*, the following statistics are found:

| Number of Train Accidents                               | 1987 | 1988 | 1989 |
|---------------------------------------------------------|------|------|------|
| Involving Hazardous Material Car                        | 351  | 475  | 517  |
| In Which Hazardous Material Car Was Damaged or Derailed | 186  | 237  | 251  |
| Involving a Release of Hazardous Materials              | 40   | 44   | 55   |
| Resulting in an Evacuation                              | 28   | 32   | 28   |

In the Senate Appropriation Committee report on the Department of Transportation's FY 90 budget it is pointed out that the Committee is concerned "that the total sum of civil penalty forfeiture collected during fiscal year 1988, is sending an inappropriate message to industry and to railroad employees and the hazardous materials community. Meaningful levels of penalties are needed to reduce noncompliance." S. Rep. No. 101-121, 101st Cong., 1st Sess. 89 (1989).

C. Recent Accidents Mandate State Involvement

As previously mentioned, the NTSB is also concerned with the DOT's failure to act and enforce regulations. See NTSB/RAR-89/04 (July 6, 1989), where the NTSB report is underscored by NTSB Member Jim Burnett's dissent which found

Our investigation establishes that . . . (FRA) failed to do its job, which in turn led to this accident.

*Id.* at 73.

The result of such malfeasance by FRA is calamitous, which no state should be forced to endure. The following accidents all involve hazardous materials, tank cars, FRA inaction, and were severe enough to merit thorough NTSB investigation. These examples are not all inclusive, but are simply representative of the extent of the problem.

On April 3, 1983, in the Denver and Rio Grande Western Railroad Company train yard in Denver, Colorado a tank car was punctured and Nitric acid was released. Nitric Acid is extremely toxic and only because the spill occurred on a Sunday was the evacuation limited to only 9,000 people. The car involved was made of aluminum and was not equipped with headshields or thermal protection which, in the NTSB's



opinion, would have prevented the accident. *See* NTSB/RAR-85/10 (May 14, 1985).

On February 5, 1984, 38 cars on a Seaboard System Railroad derailed near Clay, Kentucky. One of the derailed cars contained oleum (fuming sulfuric acid) which reacts violently when introduced to the atmosphere. The accident occurred in rural Kentucky so an evacuated area of six square miles only effected 25 families. Once again, the NTSB found an ill equipped tank car was the primary cause. *See* NTSB/SIR-85/01 (April 30 1985).

On December 31, 1984 at the Missouri Pacific Railroad Company's North Little Rock, Arkansas Rail Yard, ethylene oxide leaked from a tank car. Ethylene oxide is a clear, colorless, volatile liquid used for making rocket propellants, and is extremely toxic. Over 2,500 persons were evacuated and rail and highway traffic near the area was stopped. The NTSB found that the main cause was a faulty tank car. The investigation disclosed the fact that since 1971 the manufacturer of the involved tank car had been installing anti-shift brackets improperly. The NTSB concluded that the switchman who discovered the leak was placed in grave peril because he was not familiar with and trained in hazardous material spills response. Further, the NTSB found that FRA does not adequately monitor manufacturers for compliance with DOT standards and proper construction methods. *See* NTSB/SIR-85/03, 20 (September 4, 1985).

On February 4, 1985 anhydrous hydrofluoric acid (hydrogen fluoride) released from a tank car at Conrail's receiving yard in Elkhart, Indiana. Hydrogen fluoride is a

colorless fuming liquid used as a catalyst for various chemical reactions, as well as refining uranium, and as a component of some liquid rocket propellants. It is toxic and corrosive. The main cause was determined to be a Burlington Northern decision to continue transporting the hazardous substance eventhough the tank car was reported leaking the day before. Unsupervised decisions such as this cause an unnecessary risk of life and property to railroad employees and surrounding communities. See NTSB/HZM-85/03 (November 27, 1985).

On September 9, 1987, butadiene, a colorless, flammable gas used primarily in the manufacture of synthetic rubber, and also used in developing rocket fuels, plastics, and resins, vaporized and ignited after it leaked from the bottom manway of a tank car located at the CSX Terminal in New Orleans. The resulting flames rose one hundred feet and engulfed both bridge spans of Interstate 10. The car erupted at two in the morning, so very little traffic was on a usually busy interstate. During the next 48 hours over 200 hundred city blocks were evacuated. The tank car burned for two days and damage was estimated at \$500,000. See NTSB/HZM-88/01, 59-61 (September 30, 1988).

On February 26, 1989, in Akron, Ohio, 2,000 homes were evacuated, 17,500 passengers of the Metro Bus System were stranded, 39,000 students, teachers, employees and employers had the day off because two tank cars containing butane erupted after 21 of 49 cars derailed near a chemical plant. Adding to the potential worries of all involved was the fact that a nearby tire manufacturing plant had large quantities of acrylonitrile and ammonia gas, as well as, butadiene, the



same chemical that exploded in New Orleans, on September 8, 1987. The NTSB has yet to issue its investigation but it is just one more rail accident that may have been prevented if the FRA did its job.

Recently, a number of other accidents, all of which could have been prevented demonstrate the need for state enforcement. In Freeland, Michigan on July 22, 1989, CSX joined an Atehison Topeka-Santa Fe flat car with a history of derailments to a unit train containing hazardous materials. Predictably, the flat car derailed and three tank cars carrying hazardous materials were breached and exploded. During the NTSB investigation of the accident, it was disclosed that CSX had terminated all carmen in the region, thereby causing trains to be inadequately inspected before leaving a terminal. The NTSB has not issued its final report.

On February 2, 1989, a caboosseless train with an electronic end-of-train telemetry device ("EOT") struck three manned locomotives in Helena, Montana. Shortly thereafter, a punctured tank car containing isopropyl alcohol began leaking and another tank car containing hydrogen peroxide exploded. This caused at least 15 personal injuries, an evacuation of at least 3500 people and massive amounts of property damage. A cause of the accident was a faulty air brake system that had excessive leakage both from the brake pipe and the brake cylinders due to shrinkage of rubber gaskets brought on by extreme cold. The loss of brake pressure coupled with the failure of the EOT and the already inoperative individual car brake systems rendered the braking system useless in the gradient territory. Simply put, a railroad crew was required to

operate a train with defective brakes and without an adequate train brake inspection.

Finally, on July 6, 1989, the NTSB chastised the FRA for the inadequate enforcement programs. In NTSB/RAR-89/04, *supra*, the Board documented numerous instances of FRA oversight and neglect that contributed to the head-on collision near Altoona, Iowa, on July 30, 1988. The accident killed two operating personnel, released hazardous materials and caused estimated damages above \$1,000,000.00. The Board concluded (1) that the FRA failed to follow up on the status of the signal system, (2) the FRA failed to oversee railroad operations and failed to take enforcement action for noncompliance with Federal regulations and (3) the FRA did not have a system to follow up on reported defects on the railroad. *Id.* at pp. 66-69.

### III STATE ENFORCEMENT IS APPROPRIATE

The fact that railroads will continue to transport hazardous materials is uncontroverted. However, states must not be forced to stand aside and watch disasters happen. Moreover, due to recent developments and Federal recognition of budget constraints, it is apparent that states must play a more active role in interstate commerce.

In *Moving America, New Directions, New Opportunities*, Department of Transportation (February 1990), the Bush Administration advocates a Federal-State partnership. The National Transportation Policy urges the state and local governments to provide the major share of public sector transportation financing. *See Id.* at 42.

To have the transportation system we need for the future, we must recognize new and different roles for Federal, State, and local governments and incorporate that realignment within government transportation programs.

*Id.* at 43.

The involvement of the states is extremely important in helping to improve hazardous materials transportation. The states have a vested substantial interest in establishing effective railroad safety enforcement programs. If FRA's attitude in dealing with safety was not so deficient, significant assistance could be obtained from states to help assure that the railroads comply with the laws and regulations. From rail labor's perspective this is centered in FRA's lack of commitment to assure a safe railroad system, and the agency's lack of sufficient personnel to accomplish the task. The lack of enforcement is rampant and, if not changed soon, the railroad industry will face the similar catastrophes to those occurring under the present OSHA program. *See, Criminal Penalties For OSHA Violations, Hearings Before The Committee On Governmental Operations*, 100th Cong., 2nd Sess. (February 4, 1988).

The entire purpose of the FRSA was to abolish the railroad industry's "free market regulation." "The bulk of existing railroad safety practices was developed over the years by the industry itself." The state of the then existing safety record was abundantly clear: "The most obvious trend in any recent examination of railroad safety is the large and steady increase in the number of train accidents." *Report Of The Task Force On Railroad Safety*, Submitted to the Secretary of

Transportation, June 30, 1969.<sup>11/</sup> Yesterday the railroads failed in their attempt to self-regulate. Today, the inadequacy of the FRA enforcement provisions, coupled with the increase in accidents and incidents, and the fact that railroads are now becoming the chief transporter of hazardous materials beckons more state involvement.

Here, if the State of Ohio is foreclosed, then safety will be relegated to balance sheets. Only by a rigorous state participation in the Federal program can the public be adequately protected.

### CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully Submitted

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<sup>11/</sup> See also *Federal Railroad Safety Act of 1969: Hearings on S. 1933, S. 2915, and S. 3061 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. pp. 373-378 (1969).*

